Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-828

MARKLE MANUFACTURING COMPANY,
Defendant-Appellant-Petitioner,

versus

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS AFL-CIO-CLC, AND ITS LOCAL NO. 1000,
Plaintiffs-Appellees-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CASE CITATIONS

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No.

MARKLE MANUFACTURING COMPANY,
Defendant-Appellant-Petitioner,

versus

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS AFL-CIO-CLC, AND ITS LOCAL NO. 1000,
Plaintiffs-Appellees-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Warren E. Burger, Chief Justice of the Supreme Court of the United States and the Associate Justices of the Supreme Court of the United States

This is a petition by Markle Manufacturing Company, hereinafter usually referred to as the Company, to review a judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case.

I. OPINIONS BELOW

The Court of Appeals, in a *per curiam* decision, summarily affirmed pursuant to Local Rule 21 the decision of the United States District Court for the Western District of Texas. The decision of the Court of Appeals appears as Appendix A, attached hereto (pp. 1a-3a). The District Court's Order Granting Plaintiffs' Motion for Summary Judgment appears as Appendix B (pp. 4a-9a). The denial of the Petition for Rehearing and for Rehearing En Banc by the Court of Appeals appears as Appendix C, attached hereto (p. 10a)

II. JURISDICTION

The decision of the Court of Appeals was rendered July 14, 1976. Petitioner's Petition for Rehearing and for Rehearing En Banc was denied September 20, 1976. The jurisdiction of this Court is invoked under 28 USC Section 1254.

III. QUESTION PRESENTED

The question presented for review is: Did the District Court and the Court of Appeals err by failing to find that the arbitrator in his decision and award exceeded his authority under the collective bargaining agreement?

IV. STATUTE INVOLVED

This case involves Section 301(a) of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 USC Section 185(a), which provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any District Court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

V. STATEMENT OF THE CASE

This case is an arbitration enforcement suit filed by the union in the United States District Court for the Western District of Texas pursuant to Section 301 of the Labor Management Relations Act, as amended, 29 USC Section 185.

The arbitration award in question arose out of grievances filed by the union in connection with a layoff implemented by the Company. The economic necessity for the layoff was not disputed by the union. However, the union contended (1) that employees should have been laid off in inverse order of seniority; and (2) that employees laid off should have been allowed to displace or "bump" employees in lower rated classifications.

The Company rejected the union's grievances on the grounds that the layoff was implemented strictly in accordance with the terms and provisions of the collective bargaining agreement and that the union's grievances as filed would require amendment of the parties' collective bargaining agreement. More par-

ticularly, it was and is the Company's position that the collective bargaining agreement contains no provision for displacement or "bumping" rights for laid off employees.

In presenting its case to the arbitrator, the Company maintained:

(1) the parties' collective bargaining agreement contains no provisions for displacement or "bumping;"

(2) the arbitrator was limited by the contract to the express terms and provisions of the collective bargaining agreement;

(3) under the expressed terms of the collective bargaining agreement, the arbitrator was compelled to uphold the Company decision if "substantial reason" existed therefor.

Notwithstanding the foregoing, the arbitrator in his decision and award fashioned an extracontractual "bumping" procedure not expressly provided for in the collective bargaining agreement.

The Company refused to abide by the arbitrator's decision because it was inconsistent with the expressed provisions of the collective bargaining agreement and because the arbitrator in his decision and award exceeded the limited authority placed upon him by the collective bargaining agreement.

Thereafter, the union brought suit in the United States District Court for the Western District of Texas seeking enforcement of the arbitrator's decision and award. Both parties filed Motions for Summary Judgment.

In granting the union's Motion for Summary Judgment,the Court stated:

> While the Court does not necessarily agree with the arbitrator, nor does it necessarily concur in his decision, the Court finds that the arbitrator's decision was clearly made within, and pursuant to, the provisions of the collective bargaining agreement.

(Order Granting Plaintiff's Motion for Summary Judgment, Appendix B, pp. 5a-6a.)

Thereafter, following a timely appeal by the Company, the United States Court of Appeals for the Fifth Circuit granted summary enforcement of the District Court's decision pursuant to Local Rule 21.

VI. ARGUMENT AND AUTHORITY

The District Court and the Court of Appeals erred by failing to find that the arbitrator in his decision and award exceeded his limited authority as expressly set forth in the parties' collective bargaining agreement.

The arbitrator exceeded his authority for the following reasons:

(1) Under the contract, the arbitrator was limited in his decision to the express provisions of the contract and had no authority to amend or modify those provisions.

(2) The parties' collective bargaining agreement contains no provisions for displacement or "bumping" rights.

(3) Under the authority granted to the arbitrator in the contract, he was bound to uphold the Company's decision and action on any matter before him if it were determined that the Company had substantial reason for arriving at the decision and for taking such action.

In support of the foregoing, Petitioner would point out to the Court the following relevant contractual provisions. Article VIII, Section 5 of the parties' collective bargaining agreement expressly provides in pertinent part:

> The arbitrator will confine his decision to the specific terms of the contract and shall have no authority to change, alter, add to or delete from the contract. The arbitrator's decision rendered within the limit of this authority shall be final and binding upon the parties . . . .

Article IX, Section 4 provides in pertinent part:

> The arbitrator shall have no power to add to or subtract from, amend or modify or project beyond its express meaning any of the express terms of this agreement in any way or to any

> extent whatever . . . If the arbitrator finds that the Company had substantial reason for arriving at its decision and for taking action in any matter before him, then the Company's decision and/or action shall stand . . . . Any violation of or deviation from the express terms of this Article shall render the arbitrator's decision null, void and of no effect. . . . It is, however, understood that the arbitrator's findings shall be limited to the interpretation of the agreement and in no way shall he change or amend any part of the agreement . . .

Under the collective bargaining agreement, the Company had the unrestricted right in the event of a reduction in force to determine the classifications to be affected and the number of employees to be laid off within the affected classification. Article VII, Section 2 of the collective bargaining agreement provides in pertinent part:

> In the event of a reduction in force, the Company will determine the number of employees to be laid off and the classifications affected.

In selecting individuals to be laid off within an affected classification, the Company under the contract was to take into consideration job knowledge, job skills, physical fitness, productivity and continuous service with the Company. When, in the judgment of the Company, the other relevant factors were considered to be approximately equal, continuous service with the Company was to be the determining factor. In this regard, Article VII, Section 3 of the parties' collective bargaining agreement provides:

In cases of promotion, demotion, transfer, layoff and recall, the following factors shall be considered:

(a) Job knowledge required in the work involved and expected to be required of the employees who might be concerned.

(b) Job skills required in the work involved and expected to be required of the employees concerned.

(c) Physical fitness required in the work involved and expected to be required of the employees concerned.

(d) Productivity as demonstrated within ten (10) days.

(e) Continuous service in the Company.

When factors a, b, c, and d are approximately equal in the judgment of the Company, factor e will be the determining factor.

Accordingly, the Company, under the express provisions of the collective bargaining agreement, had the unrestricted right in the event of a reduction in force to determine the classification or classifications to be affected by the layoff and the unrestricted right to determine the number of employees to be laid off within the affected classification or classifications. The only limitation placed upon the Company in the selection of employees for layoff was to give due con-

sideration to seniority where job knowledge, job skills, physical fitness and productivity of employees within the affected classification were, in the judgment of the Company, "approximately equal." No mention is made in these provisions of displacement or "bumping" rights.

In Fashioning His Award, The Honorable Arbitrator Created And Established "Bumping" Rights Not Provided For In The Collective Bargaining Agreement

The collective bargaining agreement contains no provisions which would allow a laid off employee to displace or "bump" less senior employees in lower rated classifications. Notwithstanding, the absence of any express provision in this regard, the arbitrator, citing Article VII, Section 3(d) (quoted above), concluded that employees selected for layoff were to be allowed the option of displacing or "bumping" employees in lower rated classifications and were to be given ten (10) days within which to demonstrate their ability to perform the lower rated jobs. With all due respect to the arbitrator, the tortured construction given to Article VII, Section 3(d) is insupportable. By providing for laid off employees to displace or "bump" employees in lower rated classifications, the arbitrator has created an extracontractual "bumping" procedure not contemplated by the parties nor expressly provided for in the collective bargaining agreement.

In *United Steel Workers of America v. Enterprise Wheel and Car Corp.*, 363 US 593, 597, 46 LRRM 2423 (1960), this court stated:

> Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may, of course, look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

While the arbitrator would appear to rely upon the provisions of the contract for his decision and award, i.e. Article VII, Section 3; nevertheless, the decision and the remedy fashioned therefrom manifest an infidelity to the plain meaning of Article VII, Section 3. Article VII, Section 3 is expressly limited to "cases of promotion, demotion, transfer, layoff and recall." No mention is made of displacement or "bumping." The arbitrator's decision and award go far beyond contract construction and interpretation. The arbitrator is dispensing his own brand of industrial justice by establishing an extracontractual "bumping" procedure not contemplated by the parties nor expressly provided for in the collective bargaining agreement.

Arbitrator's Standard Of Review

The arbitrator's award is further rendered unenforceable by his failure to acknowledge and abide by the following contractual limitation placed upon him in Article IX, Section 4. Restated, Article IX, Section 4 provides in relevant part:

> If the arbitrator finds that the Company had substantial reason for arriving at its decision and for taking action in any matter before him, then the Company's decision and/or action shall stand.

To the extent that the Company's position and the union's position regarding the interpretation of the layoff provisions of the contract presented two fairly conflicting views, the arbitrator nevertheless was proscribed by the foregoing quoted provisions of Article IX, Section 4 from displacing the Company's choice even though the arbitrator possibly would have reached a different result had the matter been before him *de novo*.

It cannot be seriously maintained that "*substantial reason*" did not exist for the Company's decision and action in this matter. Indeed, the District Court recognized that "*substantial reason*" existed for the Company's position when it stated that "the Court does not necessarily agree with the arbitrator, nor does it necessarily concur in his decision . . ." (Order Granting Plaintiff's Motion for Summary Judgment, Appendix B, p. 5a) It follows then that the arbitrator was precluded by the provisions of Article IX, Section 4 from disturbing the Company's decision in this regard. A contrary decision completely negates the limitation of the arbitrator's authority bargained for by the parties and set forth in their collective bargaining agreement.

In determining whether or not the arbitrator had observed the "*substantial reason*" provisions of Arti-

cle IX, Section 4, the District Court irrelevantly concluded that the *arbitrator's* decision was "clearly supported by substantial evidence." (Order Granting Plaintiff's Motion for Summary Judgment, Appendix B, p. 6a) However, with respect to Article IX, Section 4, the relevant issue was not whether the *arbitrator's* interpretation was clearly supported by "substantial evidence"; but, rather, whether "*substantial reason*" existed for the *Company's* decision and action in the first instance. If substantial reason supported the Company's decision and action, the arbitrator was contractually compelled to honor it. The arbitrator, the District Court and the Court of Appeals all failed to perceive or take cognizance of this important contractual limitation upon the arbitrator's authority.

Reasons Relied Upon For Allowance Of The Writ

In summarily affirming the Order of the District Court, the Court of Appeals for the Fifth Circuit has rendered a decision on a question of federal labor policy in conflict with applicable decisions of this court; and has departed from accepted and usual legal principles and has sanctioned such departure by the District Court; all of which call for an exercise of this court's power of supervision and review. *United Steel Workers of America v. Enterprise Wheel and Car Corp., supra*. If allowed to stand, the decision below will render illusory the collective bargaining process and the right of freedom of contract contemplated by the Labor Management Relations Act.

VII. CONCLUSION

The arbitrator in his decision and award exceeded his authority under the relevant collective bargaining agreement. By enforcing the decision and award, the District Court and the Court of Appeals have decided a federal labor question in conflict with applicable decisions of this court.

Wherefore, Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this matter.

Respectfully submitted,

MANITZAS, FOSTER & HARRIS
1100 N.B.C. Building
San Antonio, Texas 78205

_____

J. Joe Harris

VIII. CERTIFICATE OF SERVICE

The undersigned certified that a copy of this Petition for Writ of Certiorari has been mailed to Mr. Frank Herrera, Attorney for Respondents, this ____ day of December, 1976.

_____

J. Joe Harris

APPENDIX A

United States Court of Appeals
Fifth Circuit
Office of the Clerk
July 14, 1976

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 76-1030 — INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, ET AL. VS. MARKLE MANUFACTURING CO.

Dear Counsel:

Enclosed is a copy of the Court's Rule 21 Decision this day rendered in the above case which has been entered as the judgment required by Rule 36 of the Federal Rules of Appellate Procedure.

Rules 39, 40, and 41, F.R.A.P., govern costs, petitions for rehearing and mandates, respectively. *A petition for rehearing must be filed in the Clerk's Office within 14 days from this date. Placing the petition in the mail on the 14th day will not suffice.*

Local Rule 15 provides that "A motion for a stay of the issuance of a mandate in a *direct criminal appeal* filed under F.R.A.P. Rule 41 shall not be granted simply upon request. Unless the petition sets forth good cause for stay or clearly demonstrates that a substantial question is to be presented to the Supreme Court, the

motion shall be denied and the mandate thereafter issued forthwith."

If you are court-appointed counsel, your attention is called to Local Rule 7 which provides: "Appointed counsel shall, in the event of affirmance or other decision adverse to the party represented, promptly advise him in writing of his right to seek further review by the filing of a petition for writ of certiorari with the Supreme Court, and shall file such petition, if requested by such party in writing to do so."

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

/s/ ANN BARRE
Deputy Clerk

enc.
cc: Mr. Frank S. Manitzas
Mr. Frank Herrera, Jr.

In the United States Court of Appeals
For the Fifth Circuit

No. 76-1030
Summary Calendar*

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC and its LOCAL 1000,
Plaintiffs-Appellees,

versus

MARKLE MANUFACTURING COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

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(July 14, 1976)

BEFORE GODBOLD, DYER and HILL, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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* Rule 18, 5 Cir., see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir., 1970, 431 F.2d 409 Part I

1 See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966

APPENDIX B

United States District Court
Western District of Texas
San Antonio Division

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, and its LOCAL NO. 1000

VS SA 74 CA 321

MARKLE MANUFACTURING COMPANY

ORDER GRANTING PLAINTIFFS MOTION FOR SUMMARY JUDGMENT

(Filed: Nov. 10, 1975)

This case involves a suit to enforce a labor arbitration award in which the plaintiff union is seeking to enforce the Arbitrator's Decision of October 7, 1974, rendered in favor of several of its members. The defendant company refused to abide by the Arbitration Decision alleging, for the most part, that such Decision was neither supported by substantial evidence nor did it remain within the provisions of the Collective Bargaining Agreement of February 6, 1974. Cross Motions for Summary Judgment have been filed.

Section 185(c) of Title 29 of the United States Code confers jurisdiction upon the Federal District Court to enforce labor-management contracts, including arbitration awards made pursuant to collective bargaining agreements. In reviewing an arbitrator's decision, the Courts scope of judicial review is strictly limited

to the determination of whether the decision is based upon substantial evidence and remains within the limit of the Collective Bargaining Agreement.[1] "Only when the award does not draw 'its essence from the collective bargaining agreement' should a Court refuse to enforce an award."[2]

The defendant's Motion for Summary Judgment is predicated, in the first part, upon the contention that the Arbitrator's Decision goes beyond the bounds of the February 6, 1974, Collective Bargaining Agreement. The Court does not agree.

The defendant's substantive evidence argument was considered at length and was rejected by the arbitrator. While acknowledging that the defendant believed that it had a substantial reason for laying off 16 employees without offering them the option of accepting demotion, the arbitrator found that subsequent provisions in the Collective Bargaining Agreement precluded the defendant from exercising its decision based upon this "substantial reason."[3] While the Court does not necessarily agree with the arbitrator, nor does it necessarily concur in his decision, the Court finds that the arbitrator's decision was clearly made within, and pursuant to, the provisions of the

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1 *International Association of Heat & Frost Insulators & Asbestos Workers, Local No. 66, AFL-CIO v. Leona Lee Corporation*, 489 F.2d 1032 (5th Cir. 1974) and others.

2 *Amalgamated Meat Cutters and Butcher Workmen of North America, District Local No. 540 v. Neuhoff Bros. Packers, Inc.*, 481 F.2d 817, 819 (5th Cir. 1974) citing *United Steel Workers of America v. Enterprise Wheel and Car Corporation*, 363 U.S. 593, 597 (1960).

3 Arbitration Decision, page 8, attached as Exhibit "B" to the Affidavit of Paul B. Javior.

Collective Bargaining Agreement.[4] The defendants' first argument is, therefore, found to be without merit.

In a somewhat related argument, the defendant also contends that the arbitrators decision is invalid because it violated provisions of Section IV, Article IX of the Collective Bargaining Agreement. This argument is also without merit. The arbitrators decision was based upon his analysis and interpretation of certain relevant provisions of the Collective Bargaining Agreement.[5] The arbitrators obligation to interpret provisions of the Collective Bargaining Agreement comes from within the agreement itself,[6] and such interpretation is clearly supported by substantial evidence and has a rational basis in fact.

The defendant's final contention is directed at the jurisdiction of the Court. The defendant alleges that the plaintiffs' refusal and failure to pay their proportionate share of certain arbitration expenses renders the arbitrators decision null and void:

> Any violation or deviation from the express terms of this Article shall render the arbitrators decision null, void and of no effect.[7]

The contested expense is that of providing a court reporter for reporting and transcribing the arbitration

4 Collective Bargaining Agreement, Article IX, Sections 4 and 5, attached as Exhibit "A" to the Affidavit of Paul B. Javior.

5 Articles IV, VII, VIII and IX of the Collective Bargaining Agreement of February 6, 1974, attached as Exhibit "A" to the Affidavit of Paul B. Javior.

6 *Id.* at Article IX, Section 4.

7 *Id.* at Article IX, Section 4.

proceedings. Plaintiffs admit refusing to pay their share of this expense, but allege that such refusal in no way invalidates the arbitrators decision.

The plaintiffs' refusal to pay half of the Court reporter's expense neither invalidates the arbitrators decision nor precludes this Court from exercising jurisdiction over the case. Section 4 of Article IX provides only that "[e]xpenses of the *Arbitrator* shall be evenly distributed between the company and the union." Since the specific word, *arbitrator* is used rather than the word *arbitration*, this can only be construed to mean that only the expenses directly incurred by the arbitrator himself must be shared equally between the parties. Since there are no express provisions within Article IX providing for the payment of a court reporter, and since the defendant does not allege that the plaintiffs have refused to pay fifty percent of the arbitrator's fee, the expense provision of Article IX, Section 4, has not been violated.

Since a review of the record in this cause discloses no relevant issues of fact remaining to be determined, the Court finds the summary judgment treatment is appropriate. Having found no grounds invalidating the arbitrator's decision of October 7, 1974, the Court finds such decision valid, and accordingly finds that the plaintiffs' Motion for Summary Judgment should be and the same is hereby GRANTED.

Since the defendant's refusal to abide by the arbitrator's decision was neither arbitrary nor without a potentially meritorous basis, an award of attorney's fees against the defendant in this cause would be

neither just nor appropriate.[8] Therefore, each party shall go bearing his own costs.

It is, accordingly, so ORDERED this the 10th day of November, 1975.

/s/ D. W. SUTTLE
UNITED STATES
DISTRICT JUDGE

United States District Court
Western District of Texas
San Antonio Division

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, and its LOCAL NO. 1000

versus CA No. SA 74 CA 321

MARKLE MANUFACTURING COMPANY

JUDGMENT

This action came on for consideration before the Court, Honorable D. W. Suttle, United States District

8 *Local No. 149, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America v. American Brakeshoe Company*, 492 F.2d 212 (5th Cir. 1962). Although cited by plaintiffs in support of the proposition that even in the absence of specific statutory authority, the Fifth Circuit has allowed the recovery of attorneys fees in cases involving the enforcement of arbitration awards, the Fifth Circuit in *Local 149* affirmed the District Courts decision refusing to award attorney fees against the losing defendant employer. *Id.* at 216.

Judge, and the issues having been duly considered and the Court having rendered a decision on November 10, 1975, granting plaintiffs' motion for summary judgment, it is, therefore,

ORDERED AND ADJUDGED that plaintiffs' motion for summary judgment is granted and this case is terminated, each party to bear its own costs.

DATED at San Antonio, Texas, this 10th day of November, 1975.

DAN W. BENEDICT, CLERK
UNITED STATES
DISTRICT COURT
/s/ CAROLYN K. WRIGHT
Deputy U.S. District Clerk

APPENDIX C

United States Court of Appeals
Fifth Circuit
Office of the Clerk
September 20, 1976

TO ALL COUNSEL OF RECORD

NO. 76-1030 — International Union of Electrical, Radio & Machine Workers, etc. vs. Markle Manufacturing Company

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH,
Clerk
/s/ CLARE F. SACHS
Deputy Clerk

cc: Mr. Frank S. Manitzas
Mr. Frank Herrera, Jr.